

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT W. SLUSSER,

Plaintiff-Appellant,

v

ELVIRALINDA C. SLUSSER,

Defendant-Appellee.

UNPUBLISHED

July 24, 2014

No. 315778

Oakland Circuit Court

LC No. 13-806146-DM

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

In this divorce action, plaintiff Robert Slusser appeals as of right from a trial court order granting defendant Elviralinda Slusser's motion to dismiss. Plaintiff initiated the instant action by filing a complaint for divorce from defendant. Defendant responded by moving to dismiss because she had already initiated a then-pending divorce action in another county prior to plaintiff filing this action. After a motion hearing, the trial court issued an order dismissing this action on the grounds that there was a prior divorce action between the two parties that had been filed in another county. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On March 6, 2013, plaintiff initiated this instant action in Oakland Circuit Court requesting a divorce from defendant under MCL 552.6(6). Defendant was served with the summons and complaint ten days later, on March 16, 2013, and she responded by timely filing a motion to dismiss. Attached to defendant's motion was a copy of a summons and complaint indicating that she had already filed a complaint for divorce in Livingston Circuit Court on February 7, 2013, and that a summons was issued on that date. Defendant also stated her belief that plaintiff had been properly served in the Livingston County action between March 10 and March 16, 2013. However, plaintiff claimed that he was never served, and demanded that defendant offer proper proof of service.

After holding a motion hearing on April 17, 2013, the trial court issued an order granting defendant's motion to dismiss. According to a hand-written comment on the trial court's order, plaintiff's divorce action was dismissed because there was a "[p]rior divorce action filed in Livingston County". This appeal followed.

II. STANDARD OF REVIEW

Neither the trial court nor the parties have expressly stated the court rule under which the trial court dismissed this action. However, from the language contained in the order of dismissal, this Court concludes that the trial court in effect granted summary disposition in favor of defendant under MCL 2.116(C)(6) (“Another action has been initiated between the same parties involving the same claim.”). We review de novo a trial court’s grant of summary disposition under MCR 2.116(C)(6). *Fast Air v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999).

III. SUMMARY DISPOSITION UNDER MCR 2.116(C)(6)

Plaintiff argues that the trial court’s order of dismissal was improper because defendant falsely stated that plaintiff had been properly served in the Livingston County divorce action when, in fact, plaintiff was actually never served and claims the case was later dismissed. We disagree.

Under MCL 552.9(1), a trial court has the jurisdiction to grant a judgment of divorce only if the complainant or defendant has resided in Michigan for 180 days immediately prior to filing the complaint and in the county of filing for 10 days prior to such filing. In Michigan, an action is initiated “upon the filing of a complaint, and not upon service of process.” *Fast Air*, 235 Mich App at 544. Further, “[i]t is a familiar well-established rule that the court which first obtains jurisdiction has the exclusive right to decide the matter in issue.” *Owen v Owen*, 36 Mich App 203, 206; 193 NW2d 325 (1971), rev’d in part on other grounds 386 Mich 117 (1972). Therefore, in cases where both parties to a divorce file a complaint at different times in different jurisdictions, a trial court may dismiss the later-filed action pursuant to MCR 2.116(C)(6) on the grounds that “[a]nother action has been initiated between the same parties involving the same claim.” See *Fast Air*, 235 Mich App at 544-545. However, “MCR 2.116(C)(6) does not operate where another suit between the same parties involving the same claims is *no longer pending at the time the motion is decided.*” *Id.* at 545 (emphasis added).

Whether service of process has been effected does not control the question of when an action has been initiated for purposes of determining jurisdiction. *Fast Air*, 235 Mich App at 544. Defendant initiated an action in Livingston Circuit Court on February 7, 2013, by filing a complaint for divorce. *Id.* Accordingly, Livingston Circuit Court was the court which first obtained jurisdiction because plaintiff had yet to initiate this instant action in Oakland Circuit Court, and did not do so until filing his complaint on March 6, 2013. *Owen*, 36 Mich App at 206.

Despite any issues defendant may have had with serving plaintiff, the summons issued by Livingston County was set to expire on May 9, 2013. As of April 17, 2013, the date of the motion hearing in this instant action, defendant’s divorce action in Livingston County had not been dismissed or otherwise decided. Plaintiff claims that the Livingston County Friend of the Court dismissed defendant’s divorce action on April 29, 2013, because plaintiff was never properly served. Defendant disagrees and asserts that service upon plaintiff had been attempted

several times unsuccessfully and that an extended summons and order for alternate service by publication was eventually issued. Plaintiff provided no factual support for his contention that the Livingston County divorce action was dismissed.¹

Even if there were questions as to whether the Livingston County action would continue at the time of the motion hearing in this instant action, the trial court's dismissal was proper. Under *Fast Air*, 235 Mich App at 549, where "there is another action pending and the party opposing the motion under MCR 2.116(C)(6) raises a question regarding whether that suit can and will continue, a stay of the second action pending resolution of the issue in the first action, should be granted." However, plaintiff does not argue that a stay of this instant action should have been granted, and there is no evidence to suggest that plaintiff raised such a question before the trial court at the motion hearing. Therefore, at the time the trial court granted defendant's motion to dismiss, the Livingston County action was "another action between the same parties and involving the same claims currently initiated and pending." *Id.* For that reason, the trial court did not err in granting summary disposition under MCR 2.116(C)(6).

Plaintiff next argues that defendant committed perjury by stating to the trial court her belief that plaintiff had been served in the Livingston County action when service was later found insufficient. However, plaintiff failed to file a transcript of the motion hearing. See MCR 7.210(B)(1)(a) ("[t]he appellant is responsible for securing the filing of the transcript"). In light of plaintiff's failure to produce a transcript, plaintiff's perjury argument lacks factual support and this Court will not consider the issue. See MCR 7.212(C)(7) ("[f]acts stated must be supported by specific page references to the transcript"); *People v Dunigan*, 299 Mich App 579, 587; 831 NW2d 243 (2013). Further, whether defendant made untrue statements is irrelevant to the fact that defendant's Livingston County divorce action had been initiated prior to plaintiff's and was currently pending at the time the Oakland Circuit Court granted defendant's motion to dismiss. See *Fast Air*, 235 Mich App at 545.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto

¹ At oral argument, defendant's attorney stated that "[t]he parties were in fact divorced in Livingston County in October of 2013." Plaintiff similarly stated that the divorce was "final." If the parties are in fact divorced, plaintiff's claim is moot. However, as a final judgment of divorce is not part of the record on appeal, we address the merits of plaintiff's claim.